In the Supreme Court of the United States

October Term, 1978

No. 77-1780

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

U. S. TOBACCO COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, MIDDLE DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, MIDDLE DISTRICT

A Writ of Certiorari is respectfully sought to review the judgment and opinion of the Supreme Court of the Commonwealth of Pennsylvania, Middle District, entered in this proceeding on March 23, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of the Commonwealth of Pennsylvania, Middle District, is reported in Pa. , 385 A.2d (1978), a copy of the opinion of the Supreme Court of the Commonwealth of Pennsylvania, Middle District, is attached hereto as Appendix "D". A copy of the dissenting opinion is attached as Appendix "E"

The opinion of the Commonwealth Court of Pennsylvania, is reported at 22 Pa. Commonwealth Ct. 211, 348 A.2d 755 (1975), a copy of the opinion of the Commonwealth Court of Pennsylvania is attached hereto as Appendix "A". A copy of the dissenting opinion is attached hereto as Appendix "B".

JURISDICTION

The judgment of the Supreme Court of the Commonwealth of Pennsylvania was entered on March 23, 1978, a copy of which is attached as Appendix "F". This Petition for Writ of Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257 (3).

QUESTIONS PRESENTED

In 1971, the Respondent's activities in Pennsylvania consisted of utilizing its Division Manager, Assistant Division Managers and Sales Representatives to contact wholesalers to inform them of company activities and promotions, and to take inventory of company stock and write orders; and, as to retailers, to check product distribution, replace stale merchandise, introduce new products, put new products into stock, fill counter displays, give products gratis for counter display space and make certain nonprofit sales out of the Respondent's cars registered in Pennsylvania. The questions presented here relate to the subjectivity of the Respondent to Pennsylvania corporate income tax for the year 1971, giving consideration to P.L. 86-272, 15 U.S.C.A. 381 (a), and the Commerce Clause of the United States Constitution. These questions are:

1. Whether the contradictory decisions of the State appellate courts in construing and applying P.L. 86-272, 15 U.S.C.A. 381 (a), warrant this Court to hear and resolve this recurring, crucial question.

2. Whether Congress, in enacting P.L. 86-272, 15 U.S.C.A. 381 (a), has gone beyond the sphere of its power of regulation under the Commerce Clause so as to attempt to legislatively overturn this Court's recent decisions regarding what is constitutionally permissible for a State to impose a corporate income tax.

3. Whether the lower court erred in finding that the Respondent's activities amounted to nothing more than mere solicitation within the purview of P.L. 86-272, 15 U.S.C.A. 381 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3, of the Constitution of the United States, provides as follows:

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Section 101 of the Act of September 14, 1959, 72 Stat. 555, 15 U.S.C.A. §381 (a), provides:

"(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of order by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable

such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

Section 502 of the Tax Reform Code of 1971, P.L. 6, Article V, Section 502, as amended, 72 P.S. §7502, provides in pertinent part:

"Every corporation carrying on activities in this Commonwealth or owning property in this Commonwealth by or in the name of itself or any person, partnership, joint-stock association or corporation shall be subject to and shall pay a State property tax on taxable income derived from sources within this Commonwealth at the rate of twelve per cent per annum upon each dollar of such taxable income received by and accruing to such corporation during the calendar year 1971 and the first six months of 1972 and at the rate of eleven per cent per annum upon each dollar of taxable income of such corporation received by, and accruing to such corporation during the second six months of calendar year 1972 through the calendar year 1973 and at the rate of nine and one half per cent per annum upon each dollar of taxable income of such corporation received by, and accruing to, such corporation during the calendar year 1974 and each calendar year thereafter, except where a corporation reports to the Federal Government on the basis of a fiscal year and has certified such fact to the department as required by Section 403 of Article IV[1], in which case such tax at the rate of twelve per cent shall be levied, collected and paid upon each dollar of such taxable income received by and accruing to such corporation during the first six months of the fiscal year

[1] Section 7403 of this title

commencing in calendar year 1972 and at the rate of eleven per cent shall be levied, collected, and paid upon all taxable income received by, and accruing to, such corporation during the second six months of the fiscal year commencing in the calendar year 1972 and during the fiscal year commencing in the calendar year 1973 and at the rate of nine and one-half per cent, shall be levied, collected, and paid upon all taxable income received by, and accruing to, such corporation during the fiscal year commencing in the calendar year 1974 and each fiscal year thereafter: Provided, however, That such taxable income shall not include income for any period for which the corporation is subject to taxation under Article IV.[2]"

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[2] Section 7401 et seq. of this title

STATEMENT OF THE CASE

Respondent is a corporation which is engaged in the manufacture and sale of tobacco products.

The Respondent does not have any offices, plants, bank accounts, stock inventory or corporate records in Pennsylvania.

The Respondent employs a Division Manager, Assistant Division Managers and Sales Representatives in Pennsylvania, who use company-owned cars that are registered in Pennsylvania. The Respondent's employees contact both wholesalers and retailers as follows: the Respondent's employees contact the wholesalers to inform them of company activities and promotions, take inventory of company stock, and write orders for the Respondent. As to the retailers, the Respondent's sales representatives check distribution of products, replace stale merchandise with fresh, introduce new products, get the products into the stores, fill counter displays, give some products gratis in order to get display space and sell certain stock, which is carried in the Respondent's cars, to retailers at no profit.

The Department of Revenue of Pennsylvania on February 21, 1974, mailed a Pennsylvania Corporation Income Tax "Settlement" in the amount of $70,878.52 which was computed after an apportionment percentage was applied to the Respondent's income.

The Respondent challenged the tax at the various review boards of the Department of Revenue and the Commonwealth of Pennsylvania, arguing inter alia, that the tax

violated the Commerce Clause of Article I, Section 8, Clause 3, of the Constitution of the United States, that the tax conflicted and violated the provisions of the Act of Congress of 1959, P.L. 86-272, 15 U.S.C.A. 381 (a). Following the denial of its review petitions, the Respondent filed an appeal to the Commonwealth Court of Pennsylvania on November 14, 1974. An evidentiary hearing was held followed by argument before the court en banc of seven judges.

On December 5, 1975, the court held, with two judges dissenting, that there was sufficient nexus for Pennsylvania to impose a corporate income tax upon the Respondent.

An appeal was filed to the Pennsylvania Supreme Court, which in an opinion and judgment, dated March 23, 1978, reversed the Commonwealth Court with one Justice and the Chief Justice dissenting.

REASONS FOR GRANTING THE WRIT

I. Since the various state appellate courts have decided the issue raised by this conflict contradictorily, it is of widespread importance that this Court should consider P.L. 86-272, 15 U.S.C.A. 381 (a), so that the lower courts and the States' taxing authorities be guided authoritatively.

The following sampling of cases involving similar factual situations show the diametric construction which has been placed upon P.L. 86-272, 15 U.S.C.A. 381 (a), by the various state appellate courts.

The following cases decided that P.L. 86-272, 15 U.S.C.A. 381 (a), did not prohibit the imposition of tax.

Clairol, Inc. v. Kingsley, 1970, 262 A.2d 213, 109 N.J. Super. 22, affirmed 270 A.2d 702, 57 N.J. 199, appeal dismissed, 402 U.S. 902.

Olympia Brewing Co. v. Department of Revenue, 1973, 511 P.2d 837, 266 Or. 309, cert denied, 415 U.S. 976.

Herff Jones Co. v. State Tax Commissioner, 1967, 430 P.2d 998, 247 Or. 404.

International Shoe Co. v. Cocreham, 1964, 164 So. 2d 314, 246 La. 244, cert. denied, 379 U.S. 902.

Miles Laboratories, Inc. v. Department of Revenue, Oregon, 1976, 546 P.2d 1081, 274 Or. 395.

The following cases decided that P.L. 86-272, 15 U.S.C.A. 381 (a), did prohibit the imposition of tax.

Gillette Co. v. State Tax Commission, 56 A.2d 475, 393 N.Y.S. 2d 186 (1977) (appeal pending New York Court of Appeals).

Iron Fireman Mfg. Co. v. State Tax Commission, 1968, 445 P.2d 126, 251 Or. 227.

Oklahoma Tax Commission v. Brown-Forman Distillers Corp., Okl. 1966, 420 P.2d 894.

State ex rel. Ciba Pharmaceutical Products, Inc. v. State Tax Commission, Mo. 1964, 382 S.W. 2d 645.

The issue raised by this conflict is recurring and of critical importance in the area of State corporate taxation and should be resolved by this Court.

II. Although Congress has plenary power to regulate interstate commerce, the power of Congress must be limited to the sphere of regulation and is subject to express constitutional limitation. *Katzenbach v. McClung,* 379 U.S. 294 (1964). However, the authority of Congress over interstate commerce is limited so that the distinction must exist between true regulation of commerce and the concerns of the individual States. *N.L.R.B. v. Jones and Laughlin Steel Corporation,* 301 U.S. 1 (1937). Thus, Congress cannot enact legislation allegedly pursuant to its power of regulation if said legislation is not within constitutional limits. *North American Co. v. Securities and Exchange Commission,* 327 U.S. 686 (1946).

This Court has decided a number of cases as to what is constitutionally permissible for a State to impose a corporate income tax without violating the Commerce Clause.

A partial listing of these cases upholding State corporate taxation is as follows: *Northwestern States Portland Cement Company v. Minnesota and Williams v. Stockham Valves & Fittings, Inc.,* 358 U.S. 450 (1959); *Standard Pressed Steel Company v. State of Washington, Department of Revenue,* 419 U.S. 560 (1975); *Colonial Pipeline Company v. Joseph N. Traigle,* 421 U.S. 100 (1975), and *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977).

As long as a State corporate tax does not burden or impede interstate commerce, and as long as the State does not exact more than a just share from the interstate activities of the corporate taxpayer, the Commerce Clause is not violated. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* U.S. (1978) (No. 76-1706).

In all of the foregoing decisions, this Court has held in favor of the imposition of the tax in cases involving similar or analogous facts. In the case at bar, there is a nexus to impose Pennsylvania corporate tax and there is no violation of the Commerce Clause.

Congress in enacting P.L. 86-272, 15 U.S.C.A. 381 (a), has not followed the Constitution by regulating interstate commerce but, rather, has taken on a judicial role whereby it has attempted to contravene the numerous decisions of this Court interpreting the scope of permissible State taxation. Congress has absolutely no power to regulate that which is not truly commerce. *Carter v. Carter Coal Company,* 298 U.S. 238 (1936).

This Court has repeatedly held that there is no constitutional prohibition under the Commerce Clause provided

the tax in question satisfies the criteria in the *Association of Washington Stevedoring Companies* case, supra. However, Congress has said that the States cannot impose a tax in these situations and, hence, has gone beyond the sphere of regulation by attempting to legislatively overturn decisions of this Court on constitutional interpretations.

Congressional regulation of interstate commerce cannot preclude State taxation thereof but this is precisely what P.L. 86-272, 15 U.S.C.A. 381 (a), has attempted to do. *Polish National Alliance of U.S. v. N.L.R.B.*, 322 U.S. 643 (1944).

Not only is P.L. 86-272, 15 U.S.C.A. 381 (a), in direct conflict with the recent decisions of this Court, but so is the decision of the Pennsylvania Supreme Court. A decision of the U.S. Supreme Court interpreting and applying the Commerce Clause is conclusive and binding on a State Supreme Court. *Higgins v. Carr Brothers Company*, 25 A.2d 214, 138 Me. 264, aff. 317 U.S. 572 (1942). The holding of the lower court is to the effect that the activities of the Respondent within Pennsylvania are not sufficient under the Commerce Clause for it to be constitutionally permissible for Pennsylvania to impose a corporate tax on the Respondent.

The corporate tax in question is upon "every corporation carrying on activities . . . or owning property in this Commonwealth . . .", Section 502 of the Tax Reform Code of 1971, P.L. 6, Article 5, Section 502, as amended, 72 P.S. §7502.

Given the decisions of this Court and the activities of the Respondent in Pennsylvania, Pennsylvania may impose a corporate tax upon the Respondent because both Congress, in enacting P.L. 86-272, 15 U.S.C.A. 381 (a), and the

Pennsylvania Supreme Court in following that statute, have gone directly contra to the decisions of this Court where it was expressly held that there was no constitutional violation under the Commerce Clause for the State to impose a corporate income tax.

III. Even assuming arguendo that P.L. 86-272, 15 U.S.C.A. 381 (a), is in the scope of Congress's regulation under the Commerce Clause and, hence a valid enactment, the fact remains that the Respondent engaged in activities which went far beyond mere solicitation.

The definition and scope of solicitation was reviewed by the Oregon Supreme Court in *Miles Laboratories, Inc. v. Department of Revenue*, supra. The facts of the cited case are strikingly similar to the facts of the case at bar. There, a foreign corporation had 12 salesmen who obtained orders and sent them to the corporation for acceptance. Further, the goods were shipped to the buyers from a warehouse within the State. The salesmen also maintained stocks of samples, replaced damaged merchandise, arranged advertising displays and made account presentations. The Court held that the corporation's activities in the State went beyond mere solicitation and hence the corporation could not escape State taxation. The Court made its holding giving express consideration to P.L. 86-272, 15 U.S.C.A. 381 (a).

As appears in the Statement of the Case (p. 7, supra), the facts speak for themselves and it is unquestionably evident that the numerous activities of the Respondent in Pennsylvania go far beyond mere solicitation.

The Pennsylvania Supreme Court's decision is one of unsupportable error.

CONCLUSION

The decision below is palpably erroneous in that it is in direct contradiction to the recent decisions of this Court as to the nexus which is required under the Commerce Clause of the U.S. Constitution for a State to impose corporate income tax and the present Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,
EUGENE J. ANASTASIO
VINCENT J. DOPKO
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Counsel for the Commonwealth
of Pennsylvania

APPENDIX "A"

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1516 C.D. 1974

United States Tobacco Company,
Appellant

v.

Commonwealth of Pennsylvania,
Appellee

Before:
Honorable James S. Bowman, President Judge
Honorable James C. Crumlish, Jr., Judge
Honorable Harry A. Kramer, Judge
Honorable Roy Wilkinson, Jr., Judge
Honorable Glenn E. Mencer, Judge
Honorable Theodore O. Rogers, Judge
Honorable Genevieve Blatt, Judge
Argued: September 8, 1975—Harrisburg

OPINION

Opinion by Judge Crumlish, Jr., Filed: December 5, 1975:

Presently before us is a de novo appeal from a decision and order of the Board of Finance and Revenue sus-

taining the settlement and order of the Resettlement Board[1] imposing the Corporation Income Tax[2] upon the United States Tobacco Company (Appellant) for its reporting period ending December 31, 1971. For the reasons hereinafter stated we affirm.

Appellant is a New Jersey corporation engaged in the manufacture and sale of tobacco products sold exclusively in interstate commerce and in part to Pennsylvania customers. No company manufacturing plants are maintained in Pennsylvania, and no offices, bank accounts, company records or corporate meetings are within the Commonwealth. Appellant's sole relevant contact with Pennsylvania, for the taxable period in question, was through so-

[1] The United States Tobacco Company timely filed the combined corporate tax report for the year ending December 31, 1971, wherein there was reported a Franchise Tax due the Commonwealth in the amount of $11,934, and a Corporate Net Income Tax due the Commonwealth in the amount of $69,794, and no Corporate Loans Tax. On February 21, 1974, a settlement was mailed to the Defendant wherein the Commonwealth settled the Corporation Income Tax in the amount of $70,878.52 against the Company computed as follows:

Income to be apportioned	$16,442,336.00
Apportionment percentage	.031678
Amount of income apportioned to Pennsylvania	520,860.32
Pennsylvania Corporation Income Tax	69,794.00
Total taxable income in Pennsylvania	590,654.32
Tax at the rate of 12%	70,878.52

[2] Article V of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 86, *as amended*, 72 P.S. §7501 et seq., contains the Corporation Income Tax, hereinafter referred to as the "Code".

called *missionary representatives* whose function is dispositive of the question of sufficient nexus for imposition of this tax.

Appellant's attack upon the settlement is framed as follows:

1. The imposition of Corporation Income Tax against Appellant, a corporation engaged solely in interstate commerce activities within Pennsylvania, *premised upon the sales solicitation activities of its missionary representatives* is violative of Act of September 14, 1959, 15 U.S.C. §381 et seq. and the Commerce and Due Process Clauses of the United States Constitution.

2. The add back of corporation income tax, after apportionment of Appellant's Pennsylvania income tax liability is invalid in that no statutory authority exists for such an add back, in that it results in the taxation of more of a corporation's income than is reasonably related to Pennsylvania activity, in that it discriminates against multistate corporations and it unconstitutionally taxes gross income to the extent of the add back.

I. NEXUS

Section 502 of the Code, 72 P.S. §7502, which defines imposition of the Corporation Income Tax states:

> "Every corporation carrying on activities within this Commonwealth or owning property in this Commonwealth by or in the name of itself or any person . . . shall be subject to and shall pay a State property tax on taxable income derived from sources within this Commonwealth."

The incidence of this property tax measure falls upon the taxable income derived from sources within the Common-

wealth; however, crucial to the imposition of this tax is that the corporation be *carrying on activities* sufficient to establish a nexus enabling constitutional exaction of the tax; or phrased differently, our inquiry must ultimately confront the question of whether the Commonwealth has given anything for which it can ask in return, afforded protections or conferred benefits to establish a sufficient nexus to subject Appellant to taxation. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

Both the Commonwealth and Appellant have extensively reviewed the unfolding liberalization of the law as it relates to state taxation of foreign corporations with varying degrees of connection with the taxing state. It may be beneficial for the disposition of the instant case to briefly review the law in this somewhat complex area.

Our inquiry begins with *Roy Stone Transfer Corp. v. Messner*, 377 Pa. 234, 103 A.2d 700 (1955), where the taxpayer, a foreign corporation, engaged exclusively in interstate commerce, having neither tangible or intangible property in Pennsylvania, nor any contracts, orders or solicitations within the Commonwealth, but, having merely the drivers of its trucks present in the state successfully attacked, as unconstitutional as applied to it, the Corporation Income Tax of 1951. Clearly, the Court believed that at that time no nexus existed which would justify imposition of the tax. However, following *Roy Stone*, our Supreme Court decided *Commonwealth v. Eastman-Kodak Company*, 385 Pa. 607, 124 A.2d 100 (1956), wherein under a similar factual posture, notwithstanding the fact that the taxpayer had employees using company cars and soliciting business within the Commonwealth, the Court found *Roy Stone* controlling upholding the position of the taxpayer.

Next, *Commonwealth v. United States Tobacco Company*, 70 Dauph. 217 (1957) was decided. There the taxpayer was the self same as in the present action, and that court held that the taxpayer engaging in the same practices, then as now, was doing nothing more than the taxpayer in *Eastman* and, therefore, held U.S. Tobacco Company *not subject* to tax under the Corporation Income Tax Law. Then came the United States Supreme Court's landmark decision in *Northwestern States Portland Cement Co. v. Minnesota, supra.*[3] In *Northwestern States Portland Cement*, the constitutionality of two separate state taxing statutes was in issue. In the first, Minnesota attempted to tax a foreign corporation engaged in the manufacture and sale of cement where the foreign corporation leased an office and staffed it with a manager, two salesmen and a secretary, and where those salesmen used company cars to solicit orders which were subject to acceptance and delivery by the home office. The second case involved a Georgia tax measure imposing a tax upon foreign corporations, and was factually similar to the Minnesota case. The Supreme Court there stated, citing from its prior opinion in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940):

> "[T]he 'controlling question is whether the state has given anything for which it can ask in return.' Since by 'the practical operation of [the] tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred . . .' it 'is free to pursue its own fiscal policies, unembarrassed

[3] *Williams v. Stockham Valves & Fittings* was also disposed of under this same caption.

by the Constitution'." *Northwestern Portland Cement, supra,* 358 U.S. at 465.

By validating the state taxing statutes involved, the Supreme Court immeasurably broadened the power of the state to tax foreign corporations engaged exclusively in interstate commerce with the most minimal of connections to the taxing state.[4] Seemingly in response thereto, Congress enacted Act of September 14, 1959, 15 U.S.C. §381 et seq., which, in general, prohibited a state from imposing

[4] As our Supreme Court stated in *Commonwealth v. Eastern Motor Express,* 398 Pa. 279, 295-96, 157 A.2d 79, 88 (1959):

"As we understand the Northwestern Portland Cement Company opinion, it greatly expanded the prior interpretations of what are 'local activities' which are taxable by a State even though a part of interstate commerce. From 'the tangled underbrush of past [Supreme Court] cases' the broadened rule may, we believe, be thus stated: (1) A State cannot impose a tax on or for the privilege of engaging in interstate commerce; (2) A State can impose a property tax on the net income of a foreign corporation derived from property owned or used in the taxing State and/or from 'local activities,' broadly interpreted, even though the local activities are a part of interstate commerce, provided such net income is fairly and properly apportioned to the 'local activities,' and provided (a) the tax is not discriminatory against interstate commerce; and (b) the tax does not subject the interstate commerce to multiple State taxes; and (c) the tax does not constitute an undue burden on the interstate activities of the litigating taxpayer. Furthermore, it is valid and constitutional to measure such State tax by an apportioning formula provided the formula gives a fair and just and appropriate measurement of the net income derived from 'local activities' and/or property in the taxing State: Northwestern State Portland Cement Company v. Minnesota and Williams v. Stockham Valves & Fittings, Inc., 358 U.S. supra; Butler Brothers v. McColgan, 315 U.S. 501; Turco Paint and Varnish Co. v. Kalodner, 320 Pa. 421, 184 A. 37. See also Hans Rees' Sons v. North Carolina, 283 U.S. 123."

a net income tax upon a corporation engaged in interstate commerce within the state, where that business activity resulted from *mere solicitation.*[5]

Therefore, upon review of the law of state taxation of foreign corporations engaged in interstate commerce, it becomes clear that up to this point in time the pivotal question was whether there was a situation in which the missionary men of Appellant *merely* solicited business or, whether a *solicitation-plus* situation existed which would allow the Commonwealth to subject Appellant to taxation.

The Commonwealth, in defense of its imposition of tax, relies heavily on the most recent Supreme Court pronouncement in the area in *Standard Press Steel Company v. State of Washington,* 419 U.S. 560 (1975), and *Colonial*

[5] P.L. 86-272 found at 15 U.S.C. §381 states in relevant part:

"(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

Pipeline Company v. Traigle, U.S. , 95 S.Ct. 1538 (1975). It asserts that these cases held that almost anything beyond solicitation alone will establish a sufficient nexus to tax. In *Standard Press Steel,* the State of Washington attempted to tax the taxpayer under its business and occupation tax levied upon unapportioned gross receipts. The taxpayer employed one engineer whose office was in his home and *whose primary duty was to consult with the company's Washington customer, Boeing, concerning anticipated needs of that customer.* Further, he arranged for three of his firm's engineers to visit Boeing once every six weeks. No orders were taken by the employee and orders accepted would be filled, and shipment made by common carrier, seemingly meeting the criteria of 15 U.S.C. §381 et seq. All payments were made directly to the taxpayer's home office. The employee in Washington did maintain an answering service in State, but the bills for the service were sent to the home office. On these facts, the Supreme Court found the Washington tax *constitutional* as applied to *Standard Press Steel* and stated:

> "In other words, the question is 'whether the state has given anything for which it can ask in return,' . . . . We think the question in the present case verges on frivolous. For Appellant's employee, Martinson, with a fulltime job within the state, *made possible the realization and continuance of valuable contractual relations between Appellant and Boeing." Standard Press Steel, supra,* 419 U.S. at 562. (Citations omitted.) (Emphasis added.)

The instant case presents a factual posture whereby even accepting a view of the record most favorable to Appellant, i.e., that its missionary men were merely present to promote company good will throughout the territory,[6] it cannot be denied that *their presence made possible the real-*

[6] Appellant stresses the following points: Appellant maintained no manufacturing plants or inventory in this State during 1971. Appellant maintained no offices of any kind in Pennsylvania during 1971. The company had no bank accounts in Pennsylvania during 1971. Nor did the company maintain any corporate records in this State in 1971. Further, the company held no corporate meetings in Pennsylvania during 1971. The sole contact or connection of Appellant with Pennsylvania during 1971 was through its missionary representatives whose sole functions "are confined to solicitation of orders and functions incidental thereto." Those individuals employed by Appellant in Pennsylvania "do not have any authority to accept any orders, to adjust or settle any claims, collect accounts receivable or otherwise handle any money belonging or due to the company. They have no agency powers and are not allowed to change any price list, circular or letter issued by the company. They are hired by, controlled from and paid from the Greenwich office and are subject to the direction of an administrative officer in the Greenwich, Connecticut office". The General Ledger, all billings and collections, inventory controls and sales controls are all handled from the Greenfich, Connecticut office. All orders are accepted or rejected at the Greenwich office. Orders accepted are completed on shipping orders from the Greenwich office to the nearest factory and shipped therefrom by common carriers direct to the purchasers. The large bulk of all orders for tobacco products is received directly at the Greenwich office from its direct customers without the intervention of any sales representatives or other employees of the company.

Missionary representatives of Appellant in Pennsylvania during 1971 had limited functions. As testified by Mr. George E. Stuart, an assistant division manager of Appellant, these persons generally visited retail outlets, introduced new products and set up counter displays as part of the solicitation of orders from retailers through local wholesalers.

Since there are only ten such representatives in Pennsylvania, the job involves substantial travel. Mr. Stuart at the evidentiary

ization and continuance of valuable contractual relations and so there is established sufficient nexus for the imposition of the Corporation Income Tax pursuant to the standard enunciated in *Standard Press Steel.*

II. ADD BACK

Turning to Appellant's claim that the add back was improper, we are compelled to say that our recent decision in *Triumph Hosiery Mills, Inc. v. Commonwealth of Pennsylvania,* Pa. Commonwealth Ct. , 343 A.2d 710 (1975) may well be dispositive. In that case, President Judge Bowman, harmonizing Sections 401 (3) 1 and 401 (3) 2 of the Code, 72 P.S. §§75401 (3) 1, 75401 (3) 2, pro-

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hearing detailed the extensive area covered by himself and indicated that a car is essential to the activities of Appellant's missionary representatives. Each missionary representative is therefore provided with a company-owned car. These vehicles, which are essential to the solicitation of orders by the missionary representatives constitute the only tangible property the taxpayers has in Pennsyivania.

The missionary representatives carry a limited supply of United States Tobacco Company products in their cars. These small quantities are purchased at cost by the missionary representatives from wholesalers. These products are in turn either sold to retailers at the wholesale price paid by the missionary representative or are given to the retailers "gratis".

These small quantities of United States Tobacco products are carried by the missionary representatives so that the missionary representatives have available fresh products to provide to retailers in introducing retailers to new items and to replace stale products on retailers' shelves. There is no profit or gain to Appellant as a result of the sale of these products since the items are sold at the acquisition cost paid by the representatives to wholesalers. These products are carried by the missionary representatives for purely promotional purposes and as an aid in the solicitation of orders for Appellant's products.

visions of the Corporate Net Income Tax of Article IV of the Code, wrote:

> "Therefore, we adopt the Commonwealth's interpretation of sections 401 (3) 1 and 401 (3) 2. When computing its tax base for purposes of the Pennsylvania corporate net income tax, a corporation whose entire business is *not* transacted in Pennsylvania may apportion its taxable income except insofar as said taxable income represents the 'add back' of that corporation's federal tax deduction for the Pennsylvania corporate net income tax." *Triumph Hosiery Mills, Inc. v. Commonwealth of Pennsylvania,* Pa. Commonwealth Ct. at , 343 A.2d at 713. (Emphasis added.)

Further, that opinion dealt with, and dismissed, the precise constitutional objections raised in the instant case. Therefore, the question for us to determine is whether the add back provision contained in the Corporate Net Income Tax, previously construed and validated by this Court, is either present in, or alluded to, in the Corporation Income Tax. If so, the rationale of *Triumph Hosiery Mills* is dispositive.

The Corporation Income Tax, here in issue, defines taxable income in Section 501 (3) of the Code, 72 P.S. §7501 (3) as follows:

> "(3) 'Taxable income.'
>
> 1. Taxable income shall be defined as set forth in *Article IV*.
>
> 2. In the case of corporations owning property or carrying on activities within and without this Commonwealth, the taxable income of such corporations derived from sources within the Commonwealth for

the fiscal or calendar year shall be determined by allocations and apportionments of taxable income *as set forth in Article IV*." (Emphasis added.)

As previously noted, Article IV is the Corporate Net Income Tax.[7] The Legislature was explicit in Article V in requiring taxable income to be computed *as if under Article IV*, thus necessitating the inclusion of the add back. Given this legislative pronouncement we can hold no other way but that *Triumph Hosiery Mills* controls.

ORDER

AND NOW, this 5th day of December, 1975, unless exceptions are filed hereto within thirty (30) days, the Chief Clerk is hereby directed to enter judgment against United States Tobacco Company and in favor of the Commonwealth, in the amount of $70,878.52. The Chief Clerk is further directed to mark said judgment "satisfied" inasmuch as the full amount of said judgment has been paid by United States Tobacco Company.

(s) James C. Crumlish, Jr.
James C. Crumlish, Jr., *Judge*

[7] Whereas Article V of the Code, the Corporation Income Tax is a *property tax*, Article IV, the Corporate Net Income Tax is an *excise* tax imposed on all corporations for *the privilege of doing business in* the Commonwealth.

APPENDIX "B"

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1516 C.D. 1974

United States Tobacco Company,
Appellant

v.

Commonwealth of Pennsylvania,
Appellee

DISSENTING OPINION

Dissenting Opinion by Judge Rogers, Filed: December 5, 1975:

I respectfully dissent.

The United States Tobacco Company is a New Jersey corporation engaged in the manufacture and sale of tobacco products. During the tax year here in question it maintained no manufacturing plants in Pennsylvania; it had no inventory of its products in this State; it maintained no offices in Pennsylvania; it had no bank accounts here; it maintained no corporate records here; and it held no corporate meetings in Pennsylvania.

The sole contact or connection of United States Tobacco Company with Pennsylvania was through so-called missionary representatives whose sole functions were to solicit orders. These individuals did not accept orders, adjust or settle claims or collect accounts. They were without agency powers and were not permitted to change any price list or other rule of their employer. They were hired by, controlled and paid from an out-of-state office.

The missionary representatives traveled about the State in company owned cars which constituted the only tangible property of the United States Tobacco Company located in Pennsylvania. The missionary representatives carried a limited supply of their employer's products purchased by them at cost from wholesalers which they either gave outright or sold to retailers at the wholesale price. The purpose of carrying these small quantities of products was to provide them to retailers in introducing new items or replacing stale stock in trade. There was no profit realized on the disposition of these items and they were carried and used solely for promotional purposes and as aids in the solicitation of orders.

On exactly these facts the United States Tobacco Company was held not to be subject to the Pennsylvania corporation income tax in *Commonwealth v. United States Tobacco Company*, 70 Dauphin 217 (1957).

In *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959), the Supreme Court upheld the constitutionality of state income tax impositions with respect to taxpayers engaged exclusively in interstate commerce where the sole activity of the taxpayers other than the solicitation of orders was the maintenance of an office and equipment in the taxing states. As the majority

herein notes, Congress, in response to the *Northwestern States* decision, enacted P.L. 86-272, 15 U.S.C.A. §381 et seq., denying states the power to impose taxes on the income of persons engaging in interstate commerce whose only business activity within the taxing states was that of the solicitation of orders. Since the activities of the United States Tobacco Company are limited to the activities of the company's missionary representatives, there seems to this writer to be no warrant for overruling *Commonwealth v. United States Tobacco Company, supra.*

The only authorities for so drastically changing the law advanced by the majority are *Standard Pressed Steel Company v. State of Washington*, 419 U.S. 560 (1975), and *Colonial Pipeline Company v. Traigle*, U.S. , 44 L.Ed. 1 (1975). Those cases are clearly distinguishable on the facts. Standard Pressed Steel Company was a manufacturer of metal fasteners with a home office in Pennsylvania and plants in Pennsylvania and California. Boeing Aircraft Company was a valued customer located in the State of Washington. Standard Pressed Steel had one employe permanently located in Washington. He was an *engineer* who consulted with Boeing regarding its anticipated needs for his employer's products and followed up difficulties in use of its fasteners. Standard Pressed Steel about every six weeks sent a group of its engineers to visit Boeing and meet with the latter's people on engineering problems respecting the use of the fasteners. The Supreme Court concluded that the taxpayer's engineering activities within Washington were substantial and justified the tax imposed by that state. Neither Standard Pressed Steel's full time employe nor the visiting engineers were engaged in soliciting orders for sales, as was United States Tobacco Company's only activity here.

Colonial Pipeline Company v. Traigle, supra, is also clearly distinguishable. There the taxpayer was held to have submitted to the taxing power of Louisiana by having voluntarily qualified to do business there and by maintaining employes within that state to inspect and maintain a portion of its pipeline there located. Again, the taxpayer's employes were engaged in activities other than the mere solicitation of orders to be filled from the home office.

It is my belief that the majority's holding almost obliterated the immunity conferred by the Commerce Clause and that it fails to give effect to the will of Congress expressed by P.L. 86-276.

It is further clearly contrary to the time-honored principle that "where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller." *Norton Co. v. Department of Revenue,* 340 U.S. 534, 537 (1951).

I would sustain the appeal.

(s) Theodore O. Rogers
Theodore O. Rogers, *J.*

Judge Blatt joins in this dissent.

APPENDIX "C"

ORDER

AND NOW, this 5th day of December, 1975, unless exceptions are filed hereto within thirty (30) days, the Chief Clerk is hereby directed to enter judgment against United States Tobacco Company and in favor of the Commonwealth, in the amount of $70,878.52. The Chief Clerk is further directed to mark said judgment "satisfied" inasmuch as the full amount of said judgment has been paid by United States Tobacco Company.

(s) James C. Crumlish, Jr.
James C. Crumlish, Jr., *Judge*

APPENDIX "D"

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 16 May Term, 1977

United States Tobacco Company,
Appellant

v.

Commonwealth of Pennsylvania

Appeal from the Judgment and Final Order dated March 31, 1976 of the Commonwealth Court of Pennsylvania at No. 1516 C.D. 1974, Which Decision Sustained the Decision and Order of the Board of Finance and Revenue at Board Docket No. R-774 (1974).

OPINION

JUSTICE MANDERINO, Filed: March 23, 1978:

This case presents the important question of whether Pennsylvania's Corporation Income Tax can be validly applied to a foreign corporation which is engaged solely in interstate commerce but solicits business in this Commonwealth through the use of field representatives.

The relevant facts are not in dispute. Appellant, United States Tobacco Company, is a New Jersey Corporation engaged in the manufacture and sale of tobacco products. Its products are sold exclusively in interstate commerce, in part to Pennsylvania customers. For the time period in question, appellant had no manufacturing plants in Pennsylvania, no warehouses or other structures in which inventory was stored, no offices in this state, maintained no bank accounts nor kept any corporate records, and held no corporate meetings in Pennsylvania.

Appellant's sole contact with Pennsylvania is through ten so-called "missionary representatives." These representatives, furnished with company cars, visit independent wholesalers to inform them of company activities and promotions, and sometime take orders for appellant's products. Orders obtained are sent to Greenwich, Connecticut for approval or rejection, and if approved, are filled by shipment from a point outside Pennsylvania. The representatives do not have the authority to accept an order, have no agency powers whatsoever, and no authority to adjust or settle claims, collect accounts receivable, or otherwise handle any money belonging to or due appellant.

These representatives also visit various retail outlets. On these visits, the representatives carry samples of new products. These samples are purchased from wholesalers in Pennsylvania at the wholesale price. If a retailer agrees to purchase those samples, the retailer pays the representative the same price. Hence, no profit is realized on these incidental sales. Representatives also check the retailer's existing inventory of appellant's tobacco products to determine if the products are fresh and attractively displayed. The representatives set up counter displays and sometimes give the retailers free samples of appellant's products in

exchange for more extensive counter space. The representatives maintain daily reports of their activities.

These retailers order their products directly from the independent wholesalers who, in turn, send their own orders to appellant's headquarters outside Pennsylvania.

Appellant's solicitation activities were previously the subject of litigation in this Commonwealth, and it was determined that its activities did not create a constitutional taxable nexus, *Commonwealth v. United States Tobacco Co.*, 70 Dauph. 217 (1957). The matter at that time did not reach this Court.

Pursuant to Article V of the Tax Reform Code of 1971, *as amended*, 72 P.S. §§7501-7506 (Supp. 1977-78), which imposes on corporations "carrying on activities" in Pennsylvania a tax based on taxable income derived from sources in the Commonwealth, the Commonwealth settled appellant's Corporation Income Tax for the year 1971 in the amount of $70,878.52. On August 13, 1974, the Resettlement Board denied appellant's petition for resettlement. The Board of Finance and Review subsequently sustained the settlement, as did the Commonwealth Court. *United States Tobacco Co. v. Commonwealth*, 22 Pa. Commw. Ct. 211, 348 A.2d 755 (1975). Appellant then exercised its right of appeal to this Court. *See* The Appellate Court Jurisdiction Act of 1970, §203, 17 P.S. §211.-203 (Supp. 1977-78).

Throughout this entire litigation appellant has presented three issues for resolution. Appellant claims (1) that imposing Pennsylvania's Corporation Income Tax against appellant, a foreign corporation engaged solely in the solicitation of orders for sale in interstate commerce, violates federal statutory law exempting such activity from

this kind of state taxation; (2) that because of appellant's minimal contacts with Pennsylvania, Pennsylvania's Corporation Income Tax is unconstitutional as applied to appellant; and (3) that if appellant is subject to this state tax, Pennsylvania's "add back" of corporation income tax, after apportioning appellant's income to Pennsylvania activities to determine appellant's ultimate tax liability, is void for want of statutory authority, or alternatively, is unconstitutional because it taxes more of appellant's income than Pennsylvania can legally reach.

We agree with appellant that federal statutory law exempts it from Pennsylvania's Corporation Income Tax, and reverse the order of the Commonwalth Court directing appellant to pay the tax. We therefore need not address appellant's constitutional arguments, nor do we address the issues relating to the computation (add back) of appellant's ultimate tax liability. Our holding that Congress intended to exempt appellant from this Pennsylvania tax cannot be understood without setting forth some historical background.

A state can constitutionally tax a corporation that engages solely in interstate commerce, whether the tax be called a "net income" tax, a tax on a corporation's "going concern value," or a tax on the privilege of engaging in business within a particular state. *See Complete Auto Transit, Inc. v. Brady,* U.S. , 97 S.Ct. , 51 L.Ed. 2d 326 (1977). The Commerce Clause, however, by its own force, places some limitation on a state's power to exact taxes from interstate concerns. A tax will be held valid only if the state exacts a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. *E.g., Colonial Pipeline Co. v. Triagle*, 421 U.S. 100, 95 S.Ct. 1538, 44 L.Ed. 2d 1 (1975). State taxes

which affect interstate commerce must also be consonant with constitutional concepts of due process. A nexus must exist between the tax and activities within the state for which the tax is exacted, and "the controlling question is whether the state has given anything for which it can ask return." *Standard Steel Co. v. Washington Dep't of Revenue,* 419 U.S. 560, 562, 95 S.Ct. 706, 42 L.Ed. 2d 719, 722 (1975), *citing Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267, 270-71 (1940).

United States Supreme Court decisions delineating the extent of a state's power to tax interstate commerce reflect a judicial balancing between the interests of the several states in deriving revenue from activities in interstate commerce and the burdens imposed upon the interstate corporation by pursuit of that interest. Increasingly in recent years, the balance has been struck in favor of the states if a particular tax is fairly apportioned and does not discriminate against interstate commerce, the Supreme Court has permitted states to "pursue [their] own fiscal policies, unembarrassed by the Constitution." *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267, 270 (1940).

When a foreign corporation's contacts within the state fall below a certain minimal level, however, a state may not constitutionally exact a tax on those activities. As early as 1887, the Supreme Court held that an out-of-state business could send employees ("drummers") into another state to solicit sales, and if no other activities were involved, no taxable nexus was established. *Robbins v. Shelby County Taxing Dist.,* 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694 (1887). In *Norton Co. v. Illinois Dep't of Revenue,* 340 U.S. 534, 537, 71 S.Ct. 377, 95 L.Ed. 517, 520 (1951), the principle was succinctly stated:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable."

Eight years after its decision in *Norton,* however, the Supreme Court decided *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed. 2d 421 (1959), and denied certiorari in *Brown-Forman Distillers Corp. v. Collector of Revenue,* 234 La. 651, 101 So. 2d 70 (1958), *cert. denied,* 359 U.S. 28, S.Ct. , 3 L.Ed. 2d 625 (1959). In *Northwestern States,* the Court upheld a Minnesota tax on the Minnesota income of an Iowa cement manufacturer who maintained a sales office and staff in Minnesota to solicit orders and encourage cement users there to order Northwestern cement when ordering from local wholesalers. In *Brown-Forman,* a decision which the Supreme Court refused to disturb, the Louisiana Supreme Court upheld a similar tax on a Kentucky corporation whose Louisiana activities were limited to the presence of "missionary men" who solicited Kentucky wholesalers and sometimes assisted those wholesalers in obtaining suitable displays of the products in the various retail establishments. These decisions prompted "serious apprehension in the commercial community" that activity in another state limited to soliciting business would subject interstate concerns to multiple state taxation. *See* S. Rep. No. 658, 86th Cong., 1st Sess., at 2 (1959); HR Rep. No. 936, 86th Cong., 1st Sess., at 1 (1959); 1959 U.S. Code Congressional and Administrative News 2548-61.

Congress's response to *Northwestern States* and *Brown-Forman,* and the statute relied on by appellant in this appeal, was Pub. L. 86-272, now codified at 15 U.S.C. §§381-384 (1970). By this statute, Congress sought to allay the fear that "mere solicitation" would subject interstate businesses to multiple state taxation. *See Heublin v. South Carolina Tax Comm'n,* 409 U.S. 275, 280, 93 S.Ct. 483, 34 L.Ed. 2d 472, 479 (1972). The relevant portion of the statute is §381(a), entitled "Imposition of Net Income Tax," which provides:

"Minimum standards

> No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)." (Emphasis added.)

Section 381 defines the lower limit of a state's taxing power. If a foreign corporation presumptively covered by the Act engages solely in the solicitation of orders, either by soliciting orders for the direct benefit of the foreign corporation (§381(a)(1)) or by soliciting orders which benefit an independent customer, wholesaler, or distributor (§381(a)(2)), or both, a state may not impose on that out-of-state business any tax based on or measured by net income. 15 U.S.C. §383 (1970). If the interstate corporation is involved in something more than solicitation, a state may validly tax that portion of the corporation's taxable income attributable to activity within the state. It is undisputed that appellant meets all the other statutory criteria for tax exempt status; thus our decision turns on whether appellant's activities in Pennsylvania are solicitation or something more than solicitation.

This Court has never had occasion to construe §381, and the United States Supreme Court's only opinion addressed to the statute is uninstructive on the proper interpretation of "solicitation" as it appears in the Act. *See Heublein v. South Carolina Tax Comm'n,* 409 U.S. 275, 93 S.Ct. 483, 34 L.Ed. 2d 472 (1972). In *Heublein,* the taxpayer was required to maintain a local representative in the taxing state in order to comply with state liquor regulations. This representative's functions included contacting local retailers to inform them of new company products. South Carolina law, however, required that shipments of liquor into the state be sent to this representative, who then transferred the shipments to a local wholesaler. The Court did not have to reach the issue of whether the representative's sales activities were limited to solicitation. In its view, the shipment of liquor to the representative, and subsequent transfer to a local wholesaler, "was neither

'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of §381." 409 U.S. at 278-79, 34 L.Ed. 2d at 477.

Opinions from sister states, although by no means uniform in their construction, are helpful in determining whether Congress sought to insulate from state income taxes the type of activity engaged in by appellant. In the most recent state court decision to consider §381, a New York appellate court, on facts similar to the case before us, held that the foreign corporation was exempt from a New York tax measured by income attributable to New York sales. *Gillette Co. v. State Tax Comm'n,* 56 A.D. 2d 475, 393 N.Y.S. 2d 186 (1977) (appeal pending, N.Y. Ct. Appeals). Gillette had no place of business in New York, did no manufacturing there, had no inventory in New York save for samples carried by its salesmen, and filled all orders from outside the state. Like appellant here, Gillette sold its products to a wholesaler who in turn sold its products to retail chains. The activity which the Tax Commission argued went beyond solicitation involved the interaction between Gillette's representatives and these retailers:

> "[T]he salesman tells the retailer of changes in products and of new promotions in the hope the retailer will order the new or promoted item from the . . . wholesaler. The salesman also reviews the retailer's display of Gillette products to insure they are attractively arranged and in saleable condition. It is this last activity which the respondent commission focuses on as more than solicitation, characterizing it rather as 'merchandising'."
>
> *Id.* at , 393 N.Y.S. 2d at 188.

The tax commission argued, in short, that advising retailers on display techniques, in order to make the product more attractive to the ultimate consumer, was actually a post-sale activity and hence was not solicitation.

The court reviewed the legislative history of §381, the precise statutory language, and the various state court decisions which have construed the federal law, including the Commonwealth Court's opinion in the instant case. Finding the rationale offered by the Pennsylvania Commonwealth Court to be "unconvincing" *id* at , 393 N.Y.S. 2d at 190, the court rejected the tax commission's argument that Gillette was doing more than solicitation as envisioned by §381:

> "[A]lthough it is not possible to state a general rule demarcating solicitation from merchandising, certainly where, as here, the complaining taxpayer owns no real or personal property (except salesmen's samples) in the State and makes no repairs on its goods after sale, the purpose of P.L. 86-272 would be frustrated by permitting the tax. Advice to retailers on the act of displaying goods to the public can hardly be more thoroughly solicitation, i.e., in this context, an effort to induce purchase of Gillette products. Making the evanescent distinctions which would be necessary to justify the imposition of the tax upon petitioner herein would, if indulged in by the several states, tend to 'Balkanize the American economy', a result which it was Congress's purpose to prevent."
>
> *Id.* at , 393 N.Y.S. 2d at 191.

Accord, State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n, 382 S.W. 2d 645 (Mo. 1964) (granting §381 immunity from state tax where seller's

representatives visit prospective customers, explain seller's products, and leave literature and samples of seller's product, all in an effort to persuade doctors to write prescriptions for seller's products); *Coors Porcelain co. v. State,* 517 P.2d 838 (Colo. 1973) (granting immunity where seller's representatives, *inter alia,* demonstrated seller's products, negotiated customer prices, and were supplied with company automobiles). *See also International Shoe Co. v. Cocreham,* 246 La. 244, 164 So. 2d 314, *cert. denied sub nom. Mouton v. International Shoe Co.,* 379 U.S. 902, 85 S.Ct. 193, 13 L.Ed. 2d 177 (1964), *Oklahoma Tax Comm'n v. Brown-Forman Distillery Corp.,* 420 P.2d 894 (Okla. 1966).

Illustrative of cases denying §381 immunity is *Clairol, Inc. v. Kingsley,* 109 N.J. Superior Ct. 22, 262 A.2d 755 *aff'd,* 57 N.J. 199, 270 A.2d 702 (1970), *dismissed for want of a substantial federal question,* 402 U.S. 902, 91 S.Ct. 1337, 28 L.Ed. 2d 643 (1971). Clairol's representatives, whose primary function was "to promote the public's purchase and use of its products," made regular visits to retail druggists, reviewing displays, arranging promotions, and suggesting optimum ways to merchandise Clairol's products. Clairol's representatives also carried promotion material, business forms and samples. On occasion, they also took inventory of a store's stock of Clairol's products, suggesting orders based on their findings. Furthermore, Clairol employed technicians in New Jersey to instruct its customers in how to use its products. Without deciding whether, *without the technicians,* Clairol's activities went beyond solicitation, the New Jersey Superior Court concluded that taken as a whole, Clairol's activities went beyond solicitation as defined by §381. *See also Miles Laboratories, Inc. v. Department of Revenue,* Or. , 546 P.2d 1081 (1976) (denying §381 immunity where salespeople maintained stock to replace damaged merchandise, serviced accounts, and arranged advertising displays); *Hervey v. AMF Beaird, Inc.,* 250 Ark. 147, 464 S.W. 2d 557 (1971) (since "solicitation of orders" must be narrowly construed, fact that company's representatives make regular checks of customers' inventories of company's equipment goes beyond solicitation of orders); *Olympia Brewing Co. v. Department of Revenue,* 266 Or. 309, 511 P.2d 837 (1973) (agreeing with Oregon tax court that presence of interstate company's beer kegs in taxing state stripped company of §381 immunity; expressing no opinion on tax court's determination that regular inspections of supply of seller's beer to check for shortages, and efforts to induce attractive displays of seller's products, were essentially solicitation).

Comparing those cases granting §381 immunity with those denying the same illustrates two principles of primary importance. First, each claimed §381 exemption from a state income tax must be judged on its individual facts. The totality of the solicitors' or representatives' activities must be considered, and any nexus with the taxing state that cannot accurately be characterized as "solicitation of orders" is sufficient to remove the protection of §381: *e.g.,* maintaining personal property in the state *(Olympia Brewing, supra),* employing technicians instead of salespeople *(Clairol, supra),* or having representatives collect deposits on merchandise ordered or balances of payment on merchandise delivered *Herff Jones Co. v. State Tax Comm'n,* 247 Or. 404, 430 P.2d 998 (1967). No such activities were involved in *Gillette, supra,* nor are such activities involved in the instant case. Second, and perhaps more instrumental in the disposition of these cases, is that

much depends on the breathing space courts are willing to accord the term "solicitation": The courts of Oregon and Arkansas have expressly given "solicitation" a narrow construction, see *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, , 464 S.W. 2d 557, 561-62 (1971) (citing cases), whereas the *Gillette* court decided that Congress intended that "solicitation" was not to be construed so that any activity beyond an actual request to buy a product would remove §381's protection. It is this question—the proper construction of "solicitation"—to which we now turn.

The text of §381 gives no indication of how narrowly or broadly "solicitation" should be construed when assessing the taxability of any particular set of circumstances. It is not clear whether factors such as the presence of sample goods, furnishing solicitors with automobiles, or supervision over or assistance with displays are activities merely incidental to "solicitation" and hence within the statute, or whether they are distinct activities which, either independently or in conjunction with other activities including solicitation, justify imposition of a tax. *See Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 1007-1010 (1962). We do have several aids, however, in addition to the background provided by sister state decisions, to assist us in this task. Of primary importance in the proper construction of "solicitation" is §381's legislative history, for we cannot forget that "it is essential that we place the words of a statute in their proper context by resort to the legislative history." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157, 93 S.Ct. 408, 34 L.Ed. 2d 375, 383 (1972).

We think it highly significant that the Senate Report in support of §381 specifically referred to the United States

Supreme Court's refusal to review, in *Brown-Forman, supra*, the Louisiana Supreme Court's decision, which, on facts similar to the case at bar, upheld the state's power to tax an interstate corporation. See S. Rep. No. 658, 86th Cong., 1st Sess., at 2:

> "Persons engaged in interstate commerce are in doubt as to the amount of local activities within a State that will be regarded as forming a sufficient 'nexus', that is, connection, with the State to support the imposition of a tax on net income from interstate operations * * *. [There is] a general apprehension in the business community that sales within a State obtained through the mere solicitation of orders within the State by an out-of-State company having no other activities within the State would subject the out-of-State company to the imposition of an income tax by the State on earnings of the company "properly apportioned" to the State. This apprehension is apparently strengthened by the decision of the Louisiana Supreme Court in the Brown-Forman case, which the U.S. Supreme Court refused to review. There the activities of the corporation with the State were apparently limited to the presence of 'missionary men' engaged in solicitation."

In *Brown-Forman*, the foreign corporation's "missionary men," like appellant's representatives, not only sought to procure initial orders for the company's products, but also were involved in obtaining optimum counter displays for those products. 234 La. at , 101 So. 2d at 70. When Congress enacts legislation exempting "solicitation" by an interstate corporation from a state's net income tax, and does so in response to a case where the "solicitation" involved activity incidental to the initial contact between

seller and prospective buyer, we as state courts are bound to give foreign corporations §381 immunity even though their representatives engage in activities incidental to the initial contact between buyer and seller. The question is one of degree. The foregoing analysis, however, constrains us to disagree with those courts which have concluded that Congress intended "solicitation" to be narrowly construed. *Cal-Roof Wholesale Co. v. State Tax Comm'n*, 242 Or. 435, 410 P.2d 233 (1967); *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W. 2d 557 (1971) (citing *Cal-Roof*).

Indeed, our own experience with the word solicitation supports our view that Congress saw "solicitation" as involving sundry activities so long as those activities were closely related to the eventual sale of a product. Although this Court has never construed the word "solicitation" in the framework of §381, we have had occasion to consider the term in other contexts. In *Business Tax Bureau of the School Dist. of Philadelphia v. American Cyanamid Co.*, 426 Pa. 69, 231 A.2d 116 (1967), we discussed solicitation in the context of what constitutes "doing business" for purposes of a general business tax. *See also Shambe v. Delaware & Hudson R.R.*, 288 Pa. 240, 135 A.2d 755 (1927). In those cases, we had to determine what activities would amount to something more than "solicitation" such that the taxpayer would be subject to the tax. We have said that acts of courtesy performed by business solicitors, in order to satisfy or accommodate customers, did not go beyond solicitation; nor was it relevant that the solicitors were provided facilities to carry on their solicitations. *See* 426 Pa. at , 231 A.2d at 119, *citing Lutz v. Foster & Kester Co.*, 367 Pa. 125, 129-30, 79 A.2d 222, 224 (1951). The import of these decisions is that "solicitation" does not stop at the moment a prospective customer (or wholesaler) is

asked to consider purchasing the seller's goods: other practices incident to the initial contact between buyer and seller, such as advice on making the product attractive to the ultimate consumer, also fall under the rubic "solicitation."

We therefore conclude that §381 exempts appellant from Pennsylvania's corporation income tax. Appellant's only contacts with this state—visiting retail outlets, introducing new products, and advising retailers on making attractive displays of appellant's products—are inextricably related to solicitation. Subsection (2) of §381 envisioned precisely the kind of sales activities engaged in by appellant's representatives: an effort to generate sales at the retail level so that appellant's direct customers (Pennsylvania wholesalers) will order more of appellant's products to be able to satisfy the retailers' needs. We agree with the New York court in *Gillette* that making evanescent distinctions between "solicitation" and "solicitations plus" or "merchandising," when the activities in question were all incidents to soliciting business, would defeat the very purpose of §381. Solicitation cannot mean that a foreign corporation may do no more than send salespeople into another state who leave brochures describing their employer's products, hoping the prospective customer will then take the initiative to contact the employer for a possible sale. A company which sends ten "missionary representatives" into a state to "solicit orders" cannot hope to solicit those orders by having those ten persons call on every consumer to buy its product. All of the activities of appellant's representatives were a kind of solicitation activity—as much so as the exchange of friendly amenities between a solicitor and the potential customer.

We also think it insignificant that appellant furnishes its solicitors with automobiles. *See Coors Porcelain Co. v. State, supra,* 517 P.2d 838 (Colo. 1973). Congress could hardly have intended to exempt only walking solicitors. We do not think Congress intended factors such as how the solicitors get from customer to customer to be determinative of which interstate corporations enjoy §381 immunity. The representatives' means of transportation does not change the character of their promotional activities. In our view, appellant's activities in Pennsylvania are confined to "solicitation" within the meaning of §381.

The cases relied on by appellee and the Commonwealth Court in no way control the disposition of this case. Section 381 was not at issue in either *Standard Pressed Steel Co. v. Washington,* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed. 2d 719 (1975), and *Colonial Pipeline Co. v. Triagle,* 421 U.S. 100, 95 S.Ct. 1538, 44 L.Ed. 2d 1 (1975). Neither case involved a claim that the taxpayer's activities were limited to soliciting orders. In *Standard Pressed Steel,* the out-of-state company's contact with the taxing state was a full time engineer who maintained an office in the state and whose responsibility was to advise and give consultation to the foreign company's customer there. In *Colonial Pipeline,* the taxpayer maintained piplelines and pumping stations in the taxing state. Obviously, neither taxpayer was in a position to argue that its activities were limited to solicitation of orders within the meaning of §381.

Quoting nonetheless from these cases, the Commonwealth Court dismissed appellant's claim because its representatives' presence *"made possible the realization and continuance of valuable contractual relations."* 22 Pa. Commw. Ct. at 219, 348 A.2d at 760 (emphasis in original). It seems clear to us that such a standard for a claim of §381 immunity would render this federal statute a complete nullity; the function of *any* solicitation is to "make possible the realization and continuance of valuable contractual relations." In short, we agree with the dissenting judges in the Commonwealth Court that "the [Commonwealth Court] holding almost obliterates the immunity conferred by the Commerce Clause and that it fails to give effect to the will of Congress expressed by P.L. 86-276." *Id.* at 227, 348 A.2d at 762 (Rogers & Blatt, JJ., dissenting).

Appellee's brief also raises the point that the corporate income tax does not fall within the purview of the federal statute because the tax is a "property tax" and not a net income tax. This argument is frivolous. The federal statute expressly states that "[f]or purposes of this chapter, the term 'net income tax' means any tax imposed on, or measured by, net income." 15 U.S.C. §383 (1970). The Corporation Income Tax is based on a corporation taxable income, *see* 72 P.S. §7502 (Supp. 1977-78). It is of absolutely no moment that the tax is denominated a "property tax;" it is the basis of the tax, not the nomenclature used to describe it, that is determinative. The corporation income tax is the kind of tax to which §381 is addressed.

We end by noting that our holding is a narrow one: Where a corporation engaged in interstate commerce seeks to do business in this Commonwealth, and that corporation's sole activity in the state consists of its representatives seeking to induce the purchase of the corporation's products by informing customers of new products, taking orders, and assisting in the display of those products, Congress intended that such corporation be exempt from any state tax based on the corporation's net income.

Order reversed and the case is remanded for proceedings consistent with this opinion.

Former Chief Justice Jones did not participate in the decision of this case.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Chief Justice Eagen joined.

APPENDIX "E"

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 16 May Term, 1977

United States Tobacco Company,
Appellant

v.

Commonwealth of Pennsylvania

Appeal from the Judgment and Final Order dated March 31, 1976 of the Commonwealth Court of Pennsylvania at No. 1516, C.D. 1974, which Decision Sustained the Decision and Order of the Board of Finance and Revenue at Board Docket No. R-774 (1974).

DISSENTING OPINION

ROBERTS, J., Filed: March 23, 1978:

Through an unjustified interpretation of a federal statute, the majority allows appellant, United States Tobacco Co., to escape taxation on income unquestionably earned through its activities in Pennsylvania. In reaching this conclusion, the majority overlooks a controlling decision of the United States Supreme Court, *Clairol, Inc. v. Kingsley,*

402 U.S. 902, 91 S.Ct. 1337 (1971), dismissing for want of a substantial federal question, 270 A.2d 702, 57 N.J. 199 (per curiam), aff'g 109 N.J. Super. 22, 262 A.2d 213 (1970). Today's result will allow foreign corporations with income fairly attributable to activities in Pennsylvania to escape Pennsylvania taxation, thus placing a heavy and unfair burden upon domestic taxpayers, both corporate and individual. I dissent.

The facts are not in dispute. Appellant, a New Jersey corporation, manufactures and sells tobacco products in interstate commerce, distributing its products to wholesalers in Pennsylvania, who then resell to retailers. Appellant's links to wholesalers in Pennsylvania are "missionary representatives" who solicit orders, furnish appellant's promotional materials, and sometimes take orders. These orders are processed and filled at appellant's out-of-state offices.

The missionaries also visit retail outlets who sell tobacco products in Pennsylvania, encouraging retailers to make purchases of appellant's products from wholesalers. They also hand out samples of new products repurchased by appellant from its wholesalers. Some of these samples are given gratis, in exchange for preferred display space in retail outlets. Other samples are sold to retailers at the price at which the missionary representatives purchased them from wholesalers. The representatives also, at their own discretion, rotate out retailers' stale inventory by replacing with it fresh supplies the representatives carry with them, help set up retailers' counter displays, and further promote new products of appellant. As the Assistant Division Manager of appellant for Pennsylvania testified, the missionaries' "main function would be to create good will among the retail accounts throughout the territory and in

the same token we are creating good will between United States Tobacco Company and the wholesale distributors," and that a representative is "in general . . . a good will ambassador for the Company." About 5% of appellant's retail product distributions in Pennsylvania were made directly by the missionary representatives.

In the absence of pre-emptive legislation, states have broad authority to regulate and tax commerce in ways that do not unduly burden it. Mr. Justice Blackmun, for an unanimous Court, stated:

> " 'It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938).' Colonial Pipeline Co. v. Triangle, 421 U.S. at 108, 95 S.Ct., at 1543."

Complete Auto Transit, Inc. v. Brady, U.S. , , 97 S.Ct. 1076, 1083 (1977), overruling *Spector Motor Service v. O'Connor,* 340 U.S. 602, 71 S.Ct. 508 (1951).

Congress requires the states to exempt from income taxation certain corporations doing business solely in interstate commerce:

> "Minimum standards
>
> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from

interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible person property, which orders are sent outside the State for approval or rejection, and, if, approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

15 U.S.C. §381 (a).

In enacting Section 381, Congress intended to assure interstate corporations only that solicitation would not be subjected to state taxation. The Senate Report, 2 U.S. Code Cong. & Adm. News 2548 (86th Cong. 1st. Sess. 1959), uses strong language in noting that "solicitation," and "no other business activities," would qualify as a Section 381 exemption. Id. at 2554. The Report notes that many interstate businesses were less concerned with obtaining exemption for broad classes of activities than with being certain that there is some minimal level of activity within a state below which a corporation cannot be taxed. Id. at 2550. This concern was touched off by *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S.Ct. 357 (1959). *Portland Cement* destablilized expectations of corporations whose selling techniques depended in part upon knowing which states could tax them and which could not. By removing the "travelling salesmen's exemption" that interstate businesses had enjoyed since *Robbins v. Shelby County Taxing District,* 120 U.S. 489, 7 S.Ct. 592 (1887), the Court removed any such guidelines. Section 381 was designed to exclude from state taxation only mere solicitation.

Appellant's missionary representatives perform marketing functions in Pennsylvania in addition to solicitation. They supervise retail marketing of appellant's products by providing free samples to retailers to introduce new products to the market, strategically placing counter and store displays of appellant's products, replacing stale goods on retailers' shelves with fresh materials carried in cars furnished representatives by appellant and performing similar services. To ignore this business reality, in which retailers receive goods not from out-of-state after mere solicitation from appellant, but directly from appellant's representatives in Pennsylvania, is to ignore the context in which Section 381 was passed and in which it must be interpreted.

On almost identical facts, the New Jersey courts held *Clairol, Inc.* taxable in New Jersey. *Clairol, Inc. v. Kingsley,* 109 N.J. Super. 22, 262 A.2d 213, aff'd, 57 N.J. 199, 270 A.2d 702 (1970) (solicitors performed other marketing duties such as rotating stock for freshness, setting up counter displays, etc.). The United States Supreme Court dismissed Clairol's appeal for want of a substantial federal question. 402 U.S. 902, 91 S.Ct. 1337 (1971). Such a dismissal is a decision by the Supreme Court on the merits of the particular factual situation which the case presents. *Hicks v. Miranda,* 422 U.S. 332, 343-45, 95 S.Ct. 2281, 2289 (1975). Because I see no substantial difference from the facts in *Clairol* and the facts of the instant case, I be-

lieve that *Clairol* controls our interpretation of Section 381*. See also *Zucht v. King,* 260 U.S. 174, 43 S.Ct. 24 (1922) (appeal will be dismissed when state court decision on federal question is clearly correct).

My interpretation of the word "solicitation" is also consistent with the rule that Congress is presumed to respect state sovereignty and traditional state powers unless, and only to the extent, that it explicitly limits those powers. *Employees of Department of Public Health and Welfare v. Missouri,* 411 U.S. 279, 284, 85, 93 S.Ct. 1614, 1618 (1973); 3 Sutherland, Statutory Interpretation §62.01 at 64 n.8 (Sands ed. 1974). We should thus interpret Section 381 to impose as few limitations upon the traditional state power to impose taxes as is consistent with the clear lan-

* Cases from other jurisdictions also support this distinction between mere solicitation and marketing. Two other states have explicitly construed "solicitation" to exclude even the incidentals of solicitation. ***Miles Laboratories v. Department of Revenue,*** 546 P.2d 1081 (Or. 1976) (setting up counter displays, etc., not "solicitation"; particularly noteworthy because Oregon's tax scheme allowed domestic taxpayers to escape from taxation of income earned out of state in states where it failed the §381 test); ***Herff Jones Co. v. State Tax Comm'n,*** 247 Or. 404, 430 P.2d 998 (1967) (corporation held taxable where collection of funds was the only activity beyond solicitation); ***Harvey v. AMF Beaird, Inc.,*** 250 Ark. 147, 464 S.W.2d 645 (1971). Contra, ***State ex rel. Ciba Pharmaceuticals, Inc. v. State Tax Comm'n,*** 382 S.W.2d 645 (Mo. 1964) (pre-*Clairol*) (incidentals of solicitation did not go beyond exemption of §381). Similarly, those other cases granting exemptions under §381 have involved corporations whose in-state activity did not go beyond narrow solicitation. ***Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp.,*** 420 P.2d 894 (Ok. 1966) (stipulated facts); ***International Shoe Co. v. Cocheran,*** 246 La. 244, 164 So.2d 314 (1964), cert. denied, 379 U.S. 902, 85 S.Ct. 193 (1964).

guage of the section. Such a construction compels us to conclude that "solicitation" does not include appellant's marketing techniques.

Because appellant's representatives marketed and immediately distributed products in Pennsylvania, rather than merely solicited orders to be filled from out of state, 15 U.S.C. §381 does not immunize appellant from taxation in Pennsylvania. I dissent.

Mr. Chief Justice EAGEN joins in this dissenting opinion.

APPENDIX "F"

SUPREME COURT OF PENNSYLVANIA
Middle District

No. 16 May Term, 1977

United States Tobacco Company,
Appellant

v.

Commonwealth of Pennsylvania

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Commonwealth Court of Pennsylvania is reversed and the case is remanded for proceedings consistent with this opinion.

Sally Mrvos, Prothonotary
(s) Laura E. Litchard
By: Laura E. Litchard

Date: March 23, 1978